IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT NASHVILLE
Assigned on Briefs July 17, 2007

SAMUEL L. GIDDENS v. STATE OF TENNESSEE

Appeal from the Circuit Court for Williamson County
No. A98675-111-167 Timothy Easter, Judge

No. M2006-01938-CCA-R3-PC - Filed Janaury 29, 2008

Petitioner, Samuel L. Giddens, and his co-defendant, Mr. Ronald Jasmin, were arrested based upon what occurred during a meeting set up by a confidential informant. At the time of the arrest, officers found a bag of powdered substance that turned out to be cocaine. After a jury trial, Petitioner was convicted of facilitation of possession of heroin with intent to sell or deliver and possession of cocaine with the intent to sell or deliver. An appeal to this Court was unsuccessful. Petitioner filed a petition for post-conviction relief, alleging that he was afforded ineffective assistance of counsel. After an evidentiary hearing, the post-conviction court denied the petition. Petitioner now appeals from this denial arguing that he was not afforded effective assistance of counsel based upon trial counsel's failure to file a motion to suppress. After a thorough review of the record, we hold that Petitioner has not on this record carried his burden of showing prejudice from counsel's deficient performance. Accordingly, the judgment of the lower court is affirmed.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Trial Court is Affirmed.

JERRY L. SMITH, J., delivered the opinion of the court, in which JOSEPH M. TIPTON, P.J., and JAMES CURWOOD WITT, JR., J., joined.

John P. Cauley, Franklin, Tennessee, for the appellant, Samuel L. Giddens.

Robert E. Cooper, Jr., Attorney General & Reporter; Sophia S. Lee, Assistant Attorney General; Ron Davis, District Attorney General; and Derek K. Smith, Assistant District Attorney, for the appellee, State of Tennessee.

OPINION

Factual Background

On October 27, 1999, Mr. Frank Collier, a heroin addict, contacted agents with the Drug Enforcement Administration ("DEA") and set up a meeting at the Cool Springs Marriott Hotel. *State v. Samuel L. Giddens*, No. M2002-00163-CCA-R3-CD, 2004 WL 2636715, at *1 (Tenn. Crim. App., at Nashville, Nov. 15, 2004). As he was recorded by DEA personnel, Mr. Collier called his supplier, Mr. Ronald Jasmin, and set up a meeting in a room at the Marriott. *Id.* at *1. Mr. Jasmin and Petitioner arrived at the hotel at the appointed time. *Id.* The DEA agents followed Mr. Jasmin and Petitioner from the lobby up to the hotel room. *Id.* After Petitioner and Mr. Jasmin knocked on the hotel room door, the DEA agents identified themselves. *Id.* Petitioner and Mr. Jasmin put their hands in their pants pockets, and the DEA agents restrained the two men. *Id.* The DEA agents found one bag of a powdered substance on Petitioner and four bags of a powdered substance on Mr. Jasmin. *Id.*

The powdered substance taken from Petitioner tested positive for cocaine, and the powdered substances taken from Mr. Jasmin tested positive for heroin and cocaine. *Id.* A jury convicted Petitioner of facilitation of possession of heroin with the intent to sell or deliver and possession of cocaine with the intent to sell or deliver. *Id.* Petitioner appealed his convictions. *Id.* This Court affirmed his convictions on appeal. *Id.* at *7.

Post-conviction Background

On March 31, 2004, Petitioner filed a petition for post-conviction relief. The post-conviction court appointed counsel on April 15, 2004. On July 5, 2005, the post-conviction court held an evidentiary hearing. There were two witnesses at the hearing, trial counsel and Petitioner.

A Nashville attorney referred Petitioner to his trial counsel. Trial counsel has been licensed since October of 1980. He has handled hundreds of criminal cases both as a defense attorney and a U.S. Attorney. Trial counsel recalled representing Petitioner at his preliminary hearing. He filed a discovery motion and met with Petitioner several times to review the facts of the case. Trial counsel stated that Petitioner maintained that the cocaine had been planted on him. At trial, Mr. Jasmin testified against Petitioner. Trial counsel felt that Mr. Jasmin's testimony was the key issue at trial. Trial counsel did not file a motion to suppress because, after looking at the case as a whole, he felt such a motion would have been frivolous. At the hearing, trial counsel believed that he made the correct decision with regard to not filing a motion to suppress. Trial counsel and Petitioner did discuss Petitioner possibly being held responsible for conspiracy to sell heroin or a similar charge.

Petitioner also testified at the post-conviction hearing. Petitioner stated that he and trial counsel did not discuss whether to file a motion to suppress. Petitioner did admit that he and trial counsel spoke several times. Petitioner believed that anything he suggested to trial counsel was rejected. At some point either prior to or during trial, Petitioner wanted to be represented by another attorney. However, Petitioner did not pursue it because the trial judge told him the trial would continue as scheduled. Petitioner admitted on cross-examination that he had a prior criminal history, including eight or nine felony convictions.

In an order filed August 18, 2006, the post-conviction court dismissed Petitioner's petition. The post-conviction court found that trial counsel was the more credible witness at the hearing, that the filing of a motion to suppress would not have altered the outcome of the trial, and that had trial counsel filed a motion to suppress, it would have been frivolous. Petitioner filed a timely notice of appeal.

ANALYSIS

Post-conviction Standard of Review

The post-conviction court's findings of fact are conclusive on appeal unless the evidence preponderates otherwise. *See State v. Burns*, 6 S.W.3d 453, 461 (Tenn. 1999). During our review of the issue raised, we will afford those findings of fact the weight of a jury verdict, and this Court is bound by the post-conviction court's findings unless the evidence in the record preponderates against those findings. *See Henley v. State*, 960 S.W.2d 572, 578 (Tenn. 1997); *Alley v. State*, 958 S.W.2d 138, 147 (Tenn. Crim. App. 1997). This Court may not reweigh or reevaluate the evidence, nor substitute its inferences for those drawn by the post-conviction court. *See State v. Honeycutt*, 54 S.W.3d 762, 766 (Tenn. 2001). However, the post-conviction court's conclusions of law are reviewed under a purely de novo standard with no presumption of correctness. *See Fields v. State*, 40 S.W.3d 450, 458 (Tenn. 2001).

Ineffective Assistance of Counsel

On appeal, Petitioner argues that the post-conviction court should have found that trial counsel's failure to move to suppress the evidence seized was deficient performance and was prejudicial. The State argues that trial counsel's performance was not deficient.

When a petitioner seeks post-conviction relief on the basis of ineffective assistance of counsel, the petitioner bears the burden of showing that (a) the services rendered by trial counsel were deficient and (b) that the deficient performance was prejudicial. *See Powers v. State*, 942 S.W.2d 551, 558 (Tenn. Crim. App. 1996). In order to demonstrate deficient performance, the petitioner must show that the services rendered or the advice given was below "the range of competence demanded of attorneys in criminal cases." *Baxter v. Rose*, 523 S.W.2d 930, 936 (Tenn. 1975). In order to demonstrate prejudice, the petitioner must show that there is a reasonable probability that, but for counsel's deficient performance, the result of the proceeding would have been different. *See Strickland v. Washington*, 466 U.S. 668, 694 (1984). "Because a petitioner must

establish both prongs of the test to prevail on a claim of ineffective assistance of counsel, failure to prove either deficient performance or resulting prejudice provides a sufficient basis to deny relief on the claim." *Henley*, 960 S.W.2d at 580.

As noted above, this Court will afford the post-conviction court's factual findings a presumption of correctness, rendering them conclusive on appeal unless the record preponderates against the court's findings. *See id.* at 578. However, our supreme court has "determined that issues of deficient performance by counsel and possible prejudice to the defense are mixed questions of law and fact . . . ; thus, [appellate] review of [these issues] is de novo" with no presumption of correctness. *Burns*, 6 S.W.3d at 461.

Furthermore, on claims of ineffective assistance of counsel, the petitioner is not entitled to the benefit of hindsight. *See Adkins v. State*, 911 S.W.2d 334, 347 (Tenn. Crim. App. 1994). This Court may not second-guess a reasonably-based trial strategy, and we cannot grant relief based on a sound, but unsuccessful, tactical decision made during the course of the proceedings. *See id.* However, such deference to the tactical decisions of counsel applies only if counsel makes those decisions after adequate preparation for the case. *See Cooper v. State*, 847 S.W.2d 521, 528 (Tenn. Crim. App. 1992).

At the post-conviction hearing, trial counsel testified that he thought a motion to suppress would have been frivolous for the following reason:

> The way the take-down went down. When they took him down, they found the cocaine on him and the motion to suppress would have been over that. Now, if they had grounds to arrest, they had – certainly had information that – if they shouldn't have arrested him, they had information. They had Jasmin making a phone call. They followed them to the room where the CI [confidential informant] was at, i.e., Mr. C[ollier]. There would have been no – in my opinion, there would have been no issue that would have been successful for a motion to suppress.

Trial counsel also stated during cross-examination, "[T]here wasn't anything I saw in this being an unlawful search in all the facts that were there."

In support of his argument that a motion to suppress should have been filed, Petitioner testified, "[T]he cocaine pretty much as they say that they got it out of my pocket. As I learn later, it was a Fourth Amendment violation. So, you know, he said I stated that it wasn't in my pocket which it wasn't. So they want to insist that it was, so I can deal with that."

In its order, the post-conviction court found that the filing of a motion to suppress would have been frivolous and that trial counsel was the credible witness at the hearing.

The Fourth Amendment to the United States Constitution and article I, section 7 of the Tennessee Constitution protect individuals from unreasonable searches and seizures by law enforcement officers. We begin our review by observing that "under both the federal and state constitutions, a warrantless search or seizure is presumed unreasonable, and evidence discovered as a result thereof is subject to suppression unless the State demonstrates that the search or seizure was conducted pursuant to one of the narrowly defined exceptions to the warrant requirement." *State v. Yeargan*, 958 S.W.2d 626, 629 (Tenn. 1997). That is, a trial court necessarily indulges the presumption that a warrantless search or seizure is unreasonable, and the burden is on the State to demonstrate that one of the exceptions to the warrant requirement applied at the time of the search or seizure. *Id.*

The most common exceptions to the requirement for a search warrant are: (1) consent to search; (2) a search incident to a lawful arrest; (3) probable cause to search with exigent circumstances; (4) in hot pursuit; (5) a stop and frisk situation; and (6) plain view. *See State v. Bartram*, 925 S.W.2d 227 (Tenn. 1996). "If the circumstances of a challenged search and seizure come within one of the recognized exceptions, the fruits of that search and seizure are not subject to operation of the exclusionary rule and may be properly admitted into evidence." *State v. Shaw*, 603 S.W.2d 741, 742-43 (Tenn. Crim. App. 1980).

Special Agent Gregory T. Peckinpaugh of the DEA testified at the preliminary hearing concerning the set up of the drug buy and the arrest of Petitioner and his co-defendant. He testified that he and another officer saw Petitioner and his co-defendant arrive at the hotel and followed them to the room where the confidential informant was waiting to purchase the drugs. Agent Peckinpaugh testified that he saw the two men knocking on the hotel room door and the following occurred:

> [Co-defendant and Petitioner] were knocking on the door trying to get in. At that point, Officer Tim Bailey identified who we were. We told them to place their hands up on the wall. And the subjects did not do so at that time.
>
> Q. All right. What did they do?
>
> A. Both of them reached for their [sic] area of the front of their pants. I think [the co-defendant] reached down in front of his pants or his pocket. And [Petitioner] reached toward the front of himself also which to us was a threatening action, you know, either reaching for a weapon or, you know, was in disregard to our safety.
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> At that time, we both tackled them to the floor and placed them on the floor. And I pulled [Petitioner]'s arm out from underneath him to insure [sic] that there wasn't a weapon in it and placed his arm behind his back and placed handcuffs on him and searched them out.

> When I placed [Petitioner] up against the wall and was doing the typical weapons search down in front of the pocket, somebody said something about a needle on [the co-defendant] which later turned out to be false, but so I was being very careful in searching [Petitioner] so as not to prick myself with a hypodermic needle used in narcotics. Pulled the inside of his pocket out and a small bag containing white powder, later determined to be cocaine, came out of [Petitioner's] right front pocket.[1]

As stated above, a "stop and frisk" situation has been held to be an exception to the requirement for a search warrant. In *Terry v. Ohio*, 392 U.S. 1 (1968), the United States Supreme Court held that a "stop and frisk" situation, where an officer fears for his or others' safety and "pats down" a subject to determine whether the suspect is carrying a weapon is permissible. 392 U.S. at 30. "The purpose of this limited search is not to discover evidence of crime, but to allow the officer to pursue his investigation without fear of violence." *Adams v. Williams*, 407 U.S. 143, 146 (1972). An officer must have reasonable suspicion, which must be supported by specific and articulable facts, that the suspect is armed. *Terry*, 392 U.S. at 27; *State v. Cothran*, 115 S.W.3d 513, 523 (Tenn. Crim. App. 2003). "These facts may be derived from information obtained from other law enforcement personnel or citizens, known patterns of criminal behavior, or the officer's experience. *Cothran*, 115 S.W.3d at 523 (citing *State v. Winn*, 974 S.W.2d 700, 703 (Tenn. Crim. App. 1998)). If the suspected crime would typically involve a weapon, a frisk has been upheld as reasonable. *Cothran*, 115 S.W.3d at 523. If the suspected crime does not typically involve a weapon, other circumstances may occur to justify a *Terry* frisk. *Id.* In *State v. Winn*, 974 S.W.2d 700 (Tenn. Crim. App. 1998), this Court quoted the following language to illustrate what circumstances may justify a *Terry* frisk:

> [A] characteristic bulge in the suspect's clothing; observation of an object in the pocket which might be a weapon; an otherwise inexplicable sudden movement toward a pocket or other place where a weapon could be concealed; an otherwise inexplicable failure to remove a hand from a pocket; backing away by the suspect under circumstances suggesting he was moving back to give himself time and space to draw a weapon; awareness that the suspect had previously been engaged in serious criminal conduct; awareness that the suspect had previously been armed; [and] discovery of a weapon in the suspect's possession . . . .

974 S.W.2d at 704 (quoting Wayne R. LaFave, Search and Seizure, § 9.5(a) (3d ed. 1996 & Supp. 1997) (footnotes and citations omitted)).

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[1] We can take judicial notice of the record on direct appeal. *State ex rel. Wilkerson v. Bomar*, 376 S.W.2d 451, 453 (Tenn. 1964). We have reviewed the record on direct appeal and have found that there is no additional evidence upon which a motion to suppress would be more or less likely than what was presented at the preliminary hearing.

In the case sub judice, Petitioner made a sudden movement toward his pockets when the officers told the Petitioner and co-defendant to place their hands on the wall. This would constitute a circumstance as described in *Winn*. *Id.* Therefore, the initial frisk of Petitioner by Agent Peckinpaugh would be considered as acceptable under *Terry* and its progeny. However, there are additional facts that led to the discovery of the cocaine. The officer did not state that he felt an object during the frisk, but rather that someone said the co-defendant had a needle. As a result of the statement, the officer turned out Petitioner's pocket and discovered the cocaine.

The question now becomes whether the turning out of Petitioner's pockets could conceivably be a violation of his Fourth Amendment rights. In *Minnesota v. Dickerson*, 508 U.S. 366 (1993), the United States Supreme Court analyzed whether "contraband detected through the sense of touch during a patdown search may be admitted into evidence." 508 U.S. at 371. In *Dickerson*, the Supreme Court announced that contraband found by touch during a lawful *Terry* search can be lawfully seized just as contraband discovered by the plain view doctrine during a lawful search can be lawfully seized. *Id.* at 375-76. This doctrine has been called the "plain feel" doctrine. *State v. Bridges*, 963 S.W.2d 487, 493 (Tenn. 1997). Our supreme court has stated that seizure of contraband is appropriate under the "plain feel" doctrine if:

> 1) a prior valid reason exists for the intrusion, i.e., the patdown must be permissible under *Terry*; 2) the contraband is detected while the *Terry* search for weapons legitimately is still in progress; and, 3) the incriminating nature of the object perceived by the officer's sense of touch is immediately apparent giving the officer probable cause to believe the object is contraband prior to its seizure.

Id. at 494 (citing *Dickerson*, 508 U.S. at 376-77).

In this case, as stated above, the *Terry* patdown was permissible. The contraband was detected while the *Terry* search was still in progress. However, the officer did not testify that he felt anything in Petitioner's pocket to lead him to believe that Petitioner had readily identifiable contraband in his pocket. In addition, there is a question as to how reliable an identification of a bag of cocaine could be during a patdown for weapons on the outside of clothing. The officer would have to be able to identify the bag of cocaine solely through touch through Petitioner's clothes. There are jurisdictions that recognize the permissibility of a seizure of contraband under the "plain feel" doctrine if the object is hard but do not permit the seizure if the contraband is soft. *See* Wayne R. LaFave, Search and Seizure § 9.6(c) (4th ed. 2004). There was no claim by the officer at the preliminary hearing that the incriminating nature of the contraband was "immediately apparent" so that he would have probable cause to believe the object was contraband prior to its seizure. Moreover, it should be noted that it was Petitioner's co-defendant who was the target of the arranged buy, not the Petitioner. For this reason, we conclude that Petitioner might have been successful in a motion to suppress. *See Bridges*, 963 S.W.2d at 494 (citing *Dickerson*, 508 U.S. at 376-77).

Accordingly, we cannot agree that under the limited record with which we are presented a motion to suppress would have been fruitless.

"[T]his court has stated that if arguable grounds exist to suppress incriminating evidence, then an attorney, as a zealous advocate for the client, should move to suppress that evidence. *Steven Bernard Wlodarz v. State*, No. E2002-02798-CCA-R3-PC, 2003 WL 22868267, at *6 (Tenn. Crim. App., at Knoxville, Dec. 3, 2003), *perm. app. denied*, (Tenn. May 17, 2004) (citing *Robert C. Bellafant v. State*, No. 01C01-9705-CC-00183, 1998 WL 242449, at *6 (Tenn. Crim. App., at Nashville, May 15, 1998)). When a defendant's person is searched, the constitutional protections are extremely high. Based upon the officer's testimony at the preliminary hearing, trial counsel should have reviewed the current law for any Fourth Amendment violations on which to base a motion to suppress and filed such a motion. There were definitely arguable grounds for suppression of the cocaine based upon *Dickerson*. It appears to this Court, given the limited set of facts before us, a reasonable attorney would have filed a motion to suppress. This is particularly true in a drug case where the ruling on a motion to suppress is often determinative of the case.

However, in order to obtain post-conviction relief based on a claim of ineffectiveness of counsel, Petitioner must show that he was prejudiced by trial counsel's ineffective representation. As stated above, it is Petitioner's burden to demonstrate that there is reasonable probability that the result of the proceeding would have been different. In this case, Petitioner's burden is to show that there is a reasonable probability that a motion to suppress would have been granted by either the trial court or an appellate court. *See Strickland*, 466 U.S. at 694. A reasonable probability is "a probability sufficient to undermine confidence in the outcome." *Id.*

There were only two witnesses presented at the post-conviction hearing, Petitioner and trial counsel. Petitioner also submitted the transcript of the preliminary hearing. Petitioner has presented no additional proof concerning the search other than what was adduced at the preliminary hearing. We stated above that the officer did not testify at the preliminary hearing that the bag of cocaine was "immediately apparent" during the patdown however, he was not asked that question at the preliminary hearing. Just as we cannot assume that the bag of cocaine was immediately apparent to the officer, we also cannot assume that the bag of cocaine was not immediately apparent to the officer. This Court cannot surmise what testimony would have been introduced in a hearing on a motion to suppress had one been filed. Although Petitioner has demonstrated there is no legitimate reason not to file a motion to suppress in this case and that counsel's failure to do so falls below the standards demanded by the standards of effective representation, it is all but impossible to determine what the outcome of a motion to suppress would have been without additional evidence. Therefore, based upon the record presented by Petitioner, he has not proven that there is a reasonable probability that either the trial court or an appellate court would have granted a motion to suppress.

Accordingly, we affirm the post-conviction court's denial of Petitioner's petition for post-conviction relief.

CONCLUSION

For the foregoing reasons, we affirm the decision of the post-conviction court.

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JERRY L. SMITH, JUDGE